(3)

No. 97-805

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM MULDERIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

31 pp

QUESTIONS PRESENTED

1. Whether petitioner was entitled to dismissal of the indictment based on his claim of preindictment delay.

2. Whether the statute of limitations barred petitioner's conspiracy and false statement convictions.

3. Whether the evidence supported petitioner's false statement conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Arizona v. *Youngblood*, 488 U.S. 51 (1988)	10
Biddinger v. *Commissioner of Police*, 245 U.S. 128 (1917)	16
Brady v. *Maryland*, 373 U.S. 83 (1963)	7
Bridges v. *United States*, 346 U.S. 209 (1953)	20
Bronston v. *United States*, 409 U.S. 352 (1973)	21, 22
Carlisle v. *United States*, 517 U.S. 416 (1996)	20
Howell v. *Barker*, 904 F.2d 889 (4th Cir.), cert. denied, 498 U.S. 1016 (1990)	11, 12
Jones v. *Angelone*, 94 F.3d 900 (4th Cir. 1996)	11
United States v. *Acevedo-Ramos*, 961 F.2d 305 (1st Cir.), cert. denied, 506 U.S. 905 (1992)	16, 17
United States v. *Arditti*, 955 F.2d 331 (5th Cir.), cert. denied, 506 U.S. 998 (1992)	15
United States v. *Arky*, 938 F.2d 579 (5th Cir. 1991), cert. denied, 503 U.S. 908 (1992)	16
United States v. *Armstrong*, 116 S. Ct. 1480 (1996)	15
United States v. *Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985)	13
United States v. *Barakett*, 994 F.2d 1107 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994)	16
United States v. *Bracy*, 67 F.3d 1421 (9th Cir. 1995)	10, 13

Cases—Continued: Page

United States v. *Brown*, 959 F.2d 63 (6th Cir. 1992) 10
United States v. *Canoy*, 38 F.3d 893 (7th Cir. 1994) 11, 13
United States v. *Clark*, 546 F.2d 1130 (5th Cir. 1977) 22
United States v. *Cook*, 84 U.S. (17 Wall.) 168 (1872) 16
United States v. *Cooper*, 956 F.2d 960 (10th Cir. 1992) 17, 18
United States v. *Crooks*, 766 F.2d 7 (1st Cir.), cert. denied, 474 U.S. 996 (1985) 10
United States v. *Crouch*, 84 F.3d 1497 (5th Cir. 1996), cert. denied, 117 S. Ct. 736 (1997) 4, 9
United States v. *DeTar*, 832 F.2d 1110 (9th Cir. 1987) 17
United States v. *Elliott*, 849 F.2d 554 (11th Cir. 1988) 20
United States v. *Engstrom*, 965 F.2d 836 (10th Cir. 1992) 10
United States v. *Gallup*, 812 F.2d 1271 (10th Cir. 1987) 17
United States v. *Gouveia*, 467 U.S. 180 (1984) 10
United States v. *Grady*, 544 F.2d 598 (2d Cir. 1976) 20
United States v. *Hayes*, 40 F.3d 362 (11th Cir. 1994), cert. denied, 516 U.S. 812 (1995) 9
United States v. *Hoo*, 825 F.2d 667 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988) 10
United States v. *Ismaili*, 828 F.2d 153 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988) 10
United States v. *Johnson*, 872 F.2d 612 (5th Cir. 1989) 15
United States v. *Karlin*, 785 F.2d 90 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987) 16, 17

Cases—Continued: Page

United States v. *Killian*, 639 F.2d 206 (5th Cir.), cert. denied, 451 U.S. 1021 (1981) 6
United States v. *Lighte*, 782 F.2d 367 (2d Cir. 1986) 23
United States v. *Lovasco*, 431 U.S. 783 (1977) 8-9, 13
United States v. *Marion*, 404 U.S. 307 (1971) 9
United States v. *Mayberry*, 913 F.2d 719 (9th Cir. 1990) 23
United States v. *Meeker*, 701 F.2d 685 (7th Cir.), cert. denied, 464 U.S. 826 (1983) 16-17
United States v. *Mmahat*, 106 F.3d 89 (5th Cir.), cert. denied, 118 S. Ct. 136 (1997) 2
United States v. *MMR Corp.*, 954 F.2d 1040 (5th Cir. 1992) 14
United States v. *Muniz*, 1 F.3d 1018 (10th Cir. 1993) 14
United States v. *Percio*, 870 F.2d 1090 (6th Cir. 1989) 17, 19
United States v. *Reeves*, 892 F.2d 1223 (5th Cir. 1990) 14
United States v. *Ross*, 123 F.3d 1181 (9th Cir. 1997), cert. denied, 118 S. Ct. 733 (1998) 15
United States v. *Savage*, 863 F.2d 595 (8th Cir. 1988), cert. denied, 490 U.S. 1082 (1989) 10
United States v. *Schmick*, 904 F.2d 936 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991) 20
United States v. *Sowa*, 34 F.3d 447 (7th Cir. 1994), cert. denied, 513 U.S. 1117 (1995) 11
United States v. *Stephens*, 779 F.2d 232 (5th Cir. 1985) 22
United States v. *Stierwalt*, 16 F.3d 282 (8th Cir. 1994) 9-10
United States v. *Surface*, 624 F.2d 23 (5th Cir. 1980) 15

Cases—Continued: Page

United States v. *Valentine*, 783 F.2d 1413 (9th Cir. 1986) 10
United States v. *Valone*, 834 F.2d 1334 (7th Cir. 1987) 14
United States v. *Walsh*, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825 (1983) 16
United States v. *Wells*, 117 S. Ct. 921 (1997) 21
United States v. *Williams*, 684 F.2d 296 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) 16, 17
Waters v. *United States*, 328 F.2d 739 (1964) 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) . 16

Statutes and rules:

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 19
Tit. II:
§ 205, 103 Stat. 194-195 (18 U.S.C. 1014) 19
Tit. IX:
§ 961(g)(1), 103 Stat. 500 (18 U.S.C. 1008) (repealed) 19
§ 961(h), 103 Stat. 500 19
§ 961(*l*)(1), 103 Stat. 501 (18 U.S.C. 3293) 19
Violent Crime and Law Enforcement Act of 1994 Pub. L. No. 103-322, Tit. XXXIII, § 330002(e), 108 Stat. 2140 19
18 U.S.C. 371 2
18 U.S.C. 657 2
18 U.S.C. 1006 2
18 U.S.C. 1008 ..... 2, 20, 21, 22
18 U.S.C. 3282 5
Fed. R. Crim. P.:
Rule 16(a)(2) 15
Rule 29(c) 20

Miscellaneous: Page

Model Penal Code (Tent. Draft No. 6, 1957) 23

1 Charles Alan Wright, *Federal Practice and Procedure* (2d ed. 1982 & 1993 Supp.) 17

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-805

WILLIAM MULDERIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-35a) is reported at 120 F.3d 534. The opinions of the district court that are included in the appendix to the petition (Pet. App. 1a-4a, 37a-48a, 49a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1997. A petition for rehearing was denied on September 12, 1997. The petition for a writ of certiorari was filed on November 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiring, in violation of 18 U.S.C. 371, to misapply bank funds in violation of 18 U.S.C. 657, to make false entries in bank records in violation of 18 U.S.C. 1006, and to make false statements to influence a federal agency in violation of 18 U.S.C. 1008 (Count 1); making a false statement to a financial institution, in violation of 18 U.S.C. 1008 (Count 2); and aiding and abetting the misapplication of bank funds, in violation of 18 U.S.C. 657 (Count 3).[1] The district court sentenced him to concurrent terms of 54 months' imprisonment on Counts 1 and 3 and to five years' probation on Count 2, and ordered him to

---

[1] The jury also found petitioner guilty on three additional counts of aiding and abetting the misapplication of bank funds. The district court granted his motion for judgments of acquittal on those counts. On the government's cross-appeal, the court of appeals affirmed that ruling. Pet. App. 6a, 33a-35a. In addition, co-defendants John and Joseph Mmahat were convicted of multiple conspiracy misapplication of bank funds, and false statement offenses. Joseph Mmahat died during the pendency of his appeal. The court of appeals affirmed John Mmahat's convictions and affirmed Joseph Mmahat's convictions to the extent they supported the restitution order against him, and this Court denied review. *United States* v. *Mmahat*, 106 F.3d 89, 98 (5th Cir.), cert. denied, 118 S. Ct. 136, 118 S. Ct. 200 (1997).

Before trial, co-defendant David Lichtenstein pleaded guilty to a single misapplication count (Count 9). He testified for the government at petitioner's trial pursuant to a plea agreement. Michael Farley and William Walter testified for the government pursuant to plea agreements in other cases. Marie Sciortino testified for the government under a grant of immunity. Gov't C.A. Br. 2-3 n.1.

pay restitution in the amount of $1,032,000. The court of appeals affirmed. Pet. App. 5a-35a.

1. John and Joseph Mmahat were brothers and chairman and president, respectively, of Gulf Federal Savings Bank, a federally insured financial institution located in Metairie, Louisiana. A 1983 federal audit revealed that Gulf Federal was essentially insolvent and that some of its commercial loans were unlikely to be repaid. Pet. App. 6a. To reduce the apparent amount of delinquent loans, the Mmahats made two sham loans to shell corporations owned by petitioner, an attorney and entrepreneur. See *ibid.*

The first sham loan stemmed from a transaction involving CPA Associates (CPA), an investment partnership that had acquired, through a Gulf Federal loan, a set of townhomes known as Cypress Park. By late 1984, CPA was delinquent on its loan. Instead of foreclosing, the Mmahats arranged for Cypress Park to be purchased by K & K Financial Services (K & K), which was owned by petitioner, for $2,069,000. Pet. App. 6a. On December 28, 1984, Gulf Federal loaned K & K $2,169,000 to finance the transaction. Most of the money was used to pay off the CPA loan; petitioner received $100,000 in loan proceeds after the CPA loan payoff. Petitioner later submitted to Gulf Federal a financial statement for K & K to complete the necessary loan documentation. The statement, however, did not reflect loans of $1.4 million that another bank had made to K & K to finance various other enterprises of petitioner. Pet. App. 6a-7a; Gov't C.A. Br. 8-9.

The second loan was similar, and was closed on the same day, December 28, 1984. Gulf Federal had financed the purchase by Ronald Frank of the Nel Place apartment complex, but Frank became unable to

make his payments. Gulf Federal persuaded petitioner to buy Nel Place and replace the failing loan with one to Dermul Management (Dermul), one of petitioner's companies. Frank sold Nel Place to Dermul for $1,632,730, and Gulf Federal loaned that amount to Dermul along with an additional $971,312.75, which was secured by petitioner's promise to furnish Gulf with a valid deed of trust for property he owned in Goshen, New York. Neither sham loan was repaid, and Gulf Federal went into receivership in November 1986. Pet. App. 7a; Gov't C.A. Br. 8-10.

2. a. Petitioner and the Mmahats were indicted on December 16, 1993. Before trial, petitioner moved to dismiss the indictment on grounds of excessive preindictment delay. After an evidentiary hearing, the district court ruled that petitioner had suffered prejudice from preindictment delay. Following an *in camera* review of prosecution files, however, the court denied petitioner's motion, finding that the government had not intentionally delayed the indictment to obtain a tactical advantage. After the jury returned its verdict, petitioner renewed his claim of intentional delay, which included a request for an evidentiary hearing and disclosure of the government's investigative files. The district court denied the motion. Pet. App. 7a; Gov't C.A. Br. 26-28.

Subsequently, relying on *United States* v. *Crouch*, 84 F.3d 1497 (5th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 736 (1997), petitioner moved again for an evidentiary hearing and discovery on the delay issue. 1 6th Supp. R. 25-194. The district court denied the motion. Pet. App. 49a-50a. It observed (*id.* at 50a) that the limited record in *Crouch* was "not an issue in this case," because the court had "preserved an extensive

record on this issue and fully investigated claims of bad faith by the government." After recapping the contents of the record and its own prior analysis of the issue, the court reiterated its finding that "the government's reasons for the delay, extensive documentary evidence, interlocutory appeals to the Fifth Circuit, the lack of investigative personnel, and the need to properly investigate a complex case did not rise to the level of intentional delay." *Ibid.*

b. On May 24, 1995, approximately 110 days after the district court ruled on Mulderig's initial post-trial motion, see 11 R. 2702-2723, petitioner claimed for the first time that his conspiracy and false statement convictions were barred on statute of limitations grounds. He argued that Congress's 1994 repeal of the ten-year statute of limitations applicable to his false statement offense reinstated the general five-year statute of limitations applicable to federal crimes (18 U.S.C. 3282), and that his 1993 indictment —filed more than five years after commission of the 1985 false statement offense—was therefore time-barred. He further argued that, because (in his view) one of the objects of the conspiracy charged in Count 1, *i.e.*, the false statement offense charged in Count 2, was legally insufficient, his Count 1 conviction could not stand. See 1 Supp. R. 125-132; Gov't C.A. Br. 46.

Without reaching the question whether petitioner had waived his statute of limitations claim, see 2 2d Supp. R. 409 n.1, the district court rejected it on its merits. *Id.* at 407-409. The court held (*id.* at 408) that the cases relied on by Mulderig had no application to a situation where a statute of limitations was reduced between indictment and trial. The court explained (*id.* at 409) that it is sufficient that an indictment is filed within the applicable statute of limitations; the

validity of that indictment is not impaired by a post-indictment reduction in the length of the statutory period. See also Gov't C.A. Br. 46-47.

c. In a post-trial motion for judgment of acquittal, petitioner argued that the evidence was insufficient to support his conviction on Count 2 for knowingly submitting a false K & K financial statement to Gulf Federal. In particular, he argued that the statement was not false because it was intended as a "snapshot in time." Finding that the jury had reasonably rejected that argument, the district court denied the motion. See 11 R. 2711-2712.

3. The court of appeals affirmed. Pet. App. 5a-35a. With respect to petitioner's claim of entitlement to discovery and an evidentiary hearing on the issue of preindictment delay, the court noted (*id.* at 10a) that in *Crouch* it had "neither stated nor implied that a defendant who has suffered actual and substantial prejudice as a result of the Government's preindictment delay is automatically entitled to an evidentiary hearing." The court also observed that "an in camera inspection by a district judge is a reasonable procedure and is protective of the defendant's rights." *Ibid.* (quoting *United States* v. *Killian*, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021 (1981)). Noting that the district court had conducted an *in camera, ex parte* review of the government's documents and found meritless the petitioner's claim that the government had intentionally delayed his indictment to gain a tactical advantage, the court stated that it had itself reviewed the sealed documents filed by the district court and had concluded that the district court had not abused its discretion in denying petitioner's motion. Pet. App. 10a-11a.

The court of appeals also rejected (Pet. App. 11a) petitioner's claim that the statute of limitations barred his convictions on Counts 1 and 2. Noting that such a defense is waived if not asserted at trial and that petitioner had not asserted his claim until almost 110 days after his trial had concluded, the court concluded (*ibid.*) that petitioner had waived the defense.[2]

Finally, the court of appeals rejected (Pet. App. 30a) petitioner's contention that the evidence did not support his false statement conviction because the July 1984 K & K financial statement was literally true. Characterizing petitioner's argument as "beside the point," the court pointed out that it was "undisputed" that as of February 1985 K & K had $1.4 million in outstanding loans that did not appear on the statement and that should have been, but were not, brought to Gulf Federal's attention. *Ibid.* The court held (*ibid.*) that the jury could reasonably have concluded that petitioner's after-the-fact submission of an incomplete financial statement was intended to convince federal regulators that the K & K loan was properly documented and that K & K itself was financially sound.[3]

---

2 In fact, the claim was not asserted until more than six months after trial. See p. 19, *infra*.

3 The court of appeals also rejected petitioner's arguments that the government had violated his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), see Pet. App. 11a-13a; that he had been denied a fair trial by the denial of his motion for severance, by prosecutorial misconduct, and by an evidentiary ruling, see *id.* at 13a-14a; that the district court had erred by declining to exercise jurisdiction over his third post-trial motion for a judgment of acquittal and by denying his related motion for a new trial on the basis of newly discovered evidence, see *id.* at 16a-24a; and that the evidence was insufficient to support his convictions, see *id.* at 24a-33a. The court also declined

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the court of appeals erred in ruling that, in order to establish a violation of due process by reason of excessive preindictment delay, a defendant must show not only that he suffered actual and substantial prejudice from the delay, but also that the government intentionally caused the delay in order to gain a tactical advantage over the defendant, and that the courts of appeals are in conflict over the standard for determining claims of preindictment delay. Although petitioner is correct in his assertion of a conflict, that conflict is not properly presented on the facts of this case. Moreover, under either of the competing legal standards applied in the courts of appeals, petitioner would not be entitled to relief. Accordingly, further review is unwarranted.[4]

a. The principal protection against preindictment delay is afforded by the applicable statute of limitations. Nevertheless, the Due Process Clause "has a limited role to play in protecting against oppressive delay" in the filing of an indictment. See, *e.g.*, *United*

(*id.* at 8a-9a) to issue a writ of mandamus that petitioner had sought in a related proceeding. In addition, the court affirmed (*id.* at 33a-35a) the district court's ruling that the evidence did not support petitioner's convictions on Counts 5, 7, and 8 of the indictment.

[4] Petitioner states (Pet. 7-8) that the prosecutors in this case committed misconduct when they failed to direct his attention to certain specific documents that were among the voluminous documents produced during discovery, and that the prosecutors also failed to produce certain documents that he asserts were material and exculpatory. Those claims were rejected by the court of appeals, see Pet. App. 11a-13a, 23a, and petitioner has not sought review of those rulings in this Court.

States v. *Lovasco*, 431 U.S. 783, 789 (1977). That limited protection, the Court ruled in *Lovasco* (*id.* at 789-790), is available only when the defendant has suffered actual prejudice from the delay, and the government's reasons for the delay are not adequate to justify not going forward with a trial, in light of "fundamental conceptions of justice." *Id.* at 790-791 (citations and internal quotation marks omitted). The Court held that, while delay would not be justified where the government sought "to gain tactical advantage over the accused," *id.* at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), delay in order to conduct or complete the investigation does not deprive a defendant of due process, *ibid.* Investigative delay remains justifiable even when sufficient evidence exists to seek an indictment and even when the continued investigation focuses not on the defendant himself but on other participants in related criminal activity. See *Lovasco*, 431 U.S. at 791-796. Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Id.* at 795.

The lower courts have adopted different approaches in applying the *Lovasco* standard. As the court below held in *Crouch*, 84 F.3d at 1514, most of the courts of appeals have ruled that relief is available only if the defendant is actually prejudiced and the government intended to delay the indictment in order to obtain a tactical advantage over the defendant or for some other bad faith purpose. See, *e.g.*, *United States* v. *Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), cert. denied, 516 U.S. 812 (1995); *United States* v. *Stierwalt*, 16

F.3d 282, 285 (8th Cir. 1994);[5] *United States* v. *Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States* v. *Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States* v. *Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Crooks*, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985). That reading of *Lovasco* is consistent with this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay for the purpose of obtaining a tactical advantage. See *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984); *United States* v. *Marion*, 404 U.S. at 324.

Three circuits apply a "balancing" test in assessing a due process challenge for preindictment delay. The Ninth Circuit has held that if the defendant shows prejudice, the court must then balance the length of the delay against the government's reasons for the delay. See, *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995); *United States* v. *Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The Sev-

---

[5] In an earlier case, which petitioner cites (Pet. 13), the Eighth Circuit appeared to endorse a balancing test weighing the reasons for the delay against the actual prejudice to the defendant, once the defendant had demonstrated actual prejudice. *United States* v. *Savage*, 863 F.2d 595, 598 (1988), cert. denied, 490 U.S. 1082 (1989). The Eighth Circuit does not appear to have recognized the intracircuit tension between its implicit acceptance of the majority approach in *Stierwalt* and its seeming endorsement of the minority view in *Savage*. In neither case, however, did the court dismiss the indictment, as the defendants had sought.

enth Circuit has held that once the defendant shows prejudice, the burden shifts to the government to explain the reasons for the delay, and that the court balances the prejudice against those reasons. See, *e.g.*, *United States* v. *Canoy*, 38 F.3d 893, 902 (7th Cir. 1994);[6] *United States* v. *Sowa*, 34 F.3d 447, 451 (7th Cir. 1994), cert. denied, 513 U.S. 1117 (1995). The Fourth Circuit has held that if the defendant shows actual prejudice from the delay, the court must balance the defendant's prejudice against the government's justification for the delay to determine whether the delay violated fundamental conceptions of justice or the community's sense of fair play and decency. *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990).[7]

---

[6] Petitioner cites (Pet. 13) *Canoy*, 38 F.3d at 901-902, for the proposition that "[w]here * * * the prejudice is extreme, no showing of bad faith or negligence is required." Later Seventh Circuit cases make clear that this is not the law. See *e.g.*, *United States* v. *Pardue*, No. 97-1730, 1998 WL 25694 (7th Cir. Jan. 26, 1998), at *3. Nor can *Canoy* itself be read to stand for that proposition. Instead, it merely describes the differing standards for determining claims of preindictment delay, applies the minority standard, and concludes that the defendant failed to show actual and substantial prejudice. 38 F.3d at 901-902. In addition, it notes that even if the defendant had shown such prejudice, his claim would fail because there was "no evidence indicating that the government had delayed the indictment in bad faith in order to gain a tactical advantage." *Id.* at 903. There is no such evidence in the present case either.

[7] In *Jones* v. *Angelone*, 94 F.3d 900 (4th Cir. 1996), the Fourth Circuit questioned whether a balancing test is the proper standard under *Lovasco*. The court noted that most of the courts of appeals do not use a balancing test, and that a balancing test appeared to be inconsistent with this Court's formulation of the *Lovasco* standard in *Gouveia*, *Youngblood*, and

The conflict in the circuits on this issue is not properly presented in this case. Even assuming that petitioner experienced some prejudice from delay,[8] he still is not entitled to relief. The government's reasons for the delay must be considered, and they do not provide any support for petitioner's claim of a violation of due process. The government's delayed action did not reflect a purpose to obtain a tactical advantage over petitioner or stem from any other "bad faith" reason. On the contrary, as the district court found (Pet. App. 50a), those reasons, *i.e.*, "extensive documentary evidence, interlocutory appeals to the Fifth Circuit, the lack of investigative personnel, and the need to properly investigate a complex case did not rise to the level of intentional delay." That finding defeats petitioner's claim that he was entitled to have his indictment dismissed for preindictment delay.[9]

Marion. The court recognized, however, that only the en banc court could overrule *Howell*. *Id*. at 904-905. The court ruled that under the *Howell* balancing test, the defendant was not entitled to relief. *Id*. at 909.

[8] The district court's finding of "prejudice" was based on the fact that some additional testimony and some additional documents were lost; it does not appear to have been based on a determination that the lost testimony or documents would in fact have been exculpatory. See Pet. App. 46a-47a. Such loss of evidence that could not be shown to have been exculpatory would be insufficient in any event to show the sort of prejudice that could support a claim of prejudicial preindictment delay in violation of the Due Process Clause.

[9] The district court's factual findings, left undisturbed by the court of appeals, are sufficient to refute petitioner's suggestion (see Pet. 18) that the government decided to seek petitioner's indictment because it learned that the death of a witness and the loss of files had deprived petitioner of exculpatory evidence. Those findings likewise refute petitioner's sugges-

Given the findings in this case, the difference between the two-pronged rule adopted by most of the courts of appeals and the balancing test used in three circuits would not have had any effect on the outcome. When the defendant fails to show that the government delayed the indictment to obtain a tactical advantage or for some other bad faith reason, or the record affirmatively shows (as in this case) that the government did not delay the proceedings to obtain a tactical advantage over the accused, the courts that apply the balancing test have to date uniformly denied relief. See, *e.g.*, *Bracy*, 67 F.3d at 1427 n.3 (defendants would not prevail even if they showed actual prejudice, because "the district court's determination that the government had legitimate reasons for the delay is not clearly erroneous"); *Canoy*, 38 F.3d at 901-902 (noting that "there is no evidence that the government delayed the indictment in bad faith in order to gain a tactical advantage" and stating that therefore "even if [defendant] had shown actual and substantial prejudice from the delay, we would not find a violation of due process"); see also *United States* v. *Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-404 (4th Cir. 1985). Accordingly, petitioner's claim would not have succeeded even had it arisen in a court following the minority, balancing approach. Indeed, in light of the decided cases to date, the circuit conflict appears to be more theoretical than real. While the issue might warrant this Court's review in an appropriate case, that review should await a case in which it becomes clear that the different tests would produce different outcomes.

---

tion (Pet. 15) that his prosecution violated "fundamental conceptions of justice" (*Lovasco*, 431 U.S. at 790-791).

b. Contrary to petitioner's secondary contention (see Pet. 19-20), the courts below correctly rejected petitioner's argument that he was entitled to discovery and an evidentiary hearing. A district court is not compelled to hold an evidentiary hearing on a claim of intentional preindictment delay. See *United States* v. *Muniz*, 1 F.3d 1018, 1024 (10th Cir.), cert. denied, 510 U.S. 1002 (1993); cf. *United States* v. *MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992) (a "thorough inquiry into the basis for [a] motion [to dismiss for government misconduct] could be conducted without an evidentiary hearing"). Instead, the decision to conduct an evidentiary hearing, and by implication to order discovery, is committed to the sound discretion of the trial court. See, *e.g.*, *United States* v. *Valona*, 834 F.2d 1334, 1340 (7th Cir. 1987); see also *United States* v. *Reeves*, 892 F.2d 1223, 1226 (5th Cir. 1990) (discovery rulings reviewed for abuse of discretion).

In the present case, the district court acted within its discretion in denying petitioner's motion for discovery and an evidentiary hearing on the reasons for preindictment delay. As the district court pointed out (Pet. App. 50a), it conducted a full investigation of petitioner's claim and preserved an extensive record on it. The investigation included an *in camera* review of pertinent documents from the government's files, four of which were filed under seal, and the court's interrogation of the prosecutor about the reasons for the delay. *Ibid*; see also 6 R. 1480-1481. That investigation fully satisfied any requirement of a "thorough inquiry" (*MMR Corp.*, 954 F.2d at 1046) into the basis for petitioner's motion, and convincingly refutes petitioner's claim that the court abused its discretion in denying his request for discovery and an evidentiary hearing.

In essence, petitioner sought by his discovery motion to embark on a fishing expedition into the investigative files, which are expressly protected from discovery by Federal Rule of Criminal Procedure 16(a)(2). The district court was not obliged to permit such an expedition. See *United States* v. *Arditti*, 955 F.2d 331, 345 (5th Cir.) (no abuse of discretion in denying discovery request that borders on fishing expedition), cert. denied, 506 U.S. 998 (1992); cf. *United States* v. *Armstrong*, 116 S. Ct. 1480, 1488 (1996) (high threshold required to obtain discovery from the government on a selective prosecution claim); *United States* v. *Johnson*, 872 F.2d 612, 620 (5th Cir. 1989) (*in camera* review of alleged *Brady* material proper in response to anonymous letter; prosecutor not obliged to open files to defendant for fishing expedition).[10]

---

[10] Petitioner concedes (Pet. 19) that the decisions he cites to support his claim that he was entitled to discovery and an evidentiary hearing had not "specifically address[ed] this issue." Those cases stand at most for the proposition that a district court may permit such discovery or evidentiary hearing in an appropriate case. They therefore do not conflict with the ruling of both courts below that this was not such a case. For example, in *United States* v. *Ross*, 123 F.3d 1181, 1186 (9th Cir. 1997), cert. denied, 118 S. Ct. 733 (1998), the court merely stated that defendant's counsel had in fact been permitted to depose the prosecutor about the reasons for the preindictment delay; the court did not hold that a defendant claiming prejudicial preindictment delay was entitled in each case—or in any particular class of cases—to take such a deposition. Moreover, the only other two decisions petitioner cites—*Crouch* and *United States* v. *Surface*, 624 F.2d 23, 25 n.2 (5th Cir. 1980)—were earlier decisions of the Fifth Circuit. The court of appeals explained in this case that its decision did not conflict with its earlier decision in *Crouch*. See Pet. App. 10a-11a. Even if there were any disagreement between the

2. Petitioner next contends (Pet. 20-23) that the court of appeals erred in holding that he had waived his statute of limitations claim, and that the courts of appeals are in conflict over this issue as well. Petitioner's contentions lack merit. The court of appeals correctly held that he had waived his claim that the statute of limitations barred his prosecution. Moreover, even if petitioner had not waived that claim, he could not prevail on it. Accordingly, the present case is not a suitable vehicle for resolving any conflict that may exist in the courts of appeals over the issue.

It is well settled that the running of the statute of limitations does not defeat a trial court's jurisdiction. Rather, it is an affirmative defense that is waived if not raised before or during a defendant's trial. See, *e.g.*, *United States* v. *Barakett*, 994 F.2d 1107, 1110 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994); *United States* v. *Acevedo-Ramos*, 961 F.2d 305, 307 (1st Cir.), cert. denied, 506 U.S. 905 (1992); *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991), cert. denied, 503 U.S. 908 (1992); *United States* v. *Karlin*, 785 F.2d 90, 92 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987); *United States* v. *Walsh*, 700 F.2d 846, 855 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); see also *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872). To benefit from a limitations defense, a defendant must affirmatively assert it. *United States* v.

---

decision of the court of appeals here and the decisions of the same court in *Crouch* and *Surface*, that disagreement would be a matter to be resolved by the Fifth Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

Meeker, 701 F.2d 685, 687 (7th Cir.), cert. denied, 464 U.S. 826 (1983); see also 1 Charles Alan Wright, *Federal Practice and Procedure* § 193, at 707-708 & n.52 (2d ed. 1982 & 1993 Supp.).

There is no merit to petitioner's claim (Pet. 22-23) that a waiver of the statute of limitations must be express and knowing. See, *e.g.*, *United States* v. *DeTar*, 832 F.2d 1110, 1115 (9th Cir. 1987) (request for lesser-included-offense instruction on allegedly time-barred charge waives limitations defense); *Williams*, 684 F.2d at 299-300 (same). The cases that have directly addressed the issue have held that the defense is deemed waived if it is not raised at trial. *Karlin*, 785 F.2d at 92; *Meeker*, 701 F.2d at 687; cf. *Acevedo-Ramos*, 961 F.2d at 308-309. Indeed, there is no apparent reason why the statute of limitations defense "alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial." *Arky*, 938 F.2d at 582.

Contrary to petitioner's claim (Pet. 21), the decision in this case does not create a conflict with the Tenth Circuit's decisions in *Waters* v. *United States*, 328 F.2d 739 (1964), and *United States* v. *Cooper*, 956 F.2d 960 (1992), warranting this Court's review. The Tenth Circuit initially concluded in *Waters* that the statute of limitations defense could be raised for the first time on appeal. 328 F.2d at 743. But the Tenth Circuit subsequently observed in *United States* v. *Gallup*, 812 F.2d 1271, 1280 (1987), that "[i]t is well settled that the statute of limitations is an affirmative defense which is waived unless raised at trial." See *United States* v. *Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989) (noting Tenth Circuit's apparent reevaluation of *Waters*).

The court in *Cooper* did allow a defendant who had pleaded guilty to raise a statute of limitations defense because there had been no express waiver of that defense. The facts of *Cooper*, however, are quite different from the facts here. In *Cooper*, the defendant pleaded guilty pursuant to a plea agreement reached before the statute of limitations had run; after entering the plea, she learned that the information, although timely lodged with the court by the government, had not been filed until after the statute of limitations had expired.[11] The defendant raised the statute of limitations defense in the district court as soon as she learned of the facts supporting it, but the district court held that the defense was waived by her guilty plea. The court of appeals reversed, stating that "while we agree with those courts which hold that a defendant can waive the statute of limitations," there was no express waiver in the case before it. 956 F.2d at 962. The court concluded that "[t]he defendant simply entered a plea to a barred charge" and was entitled to relief. *Id.* at 963.

While we disagree with the Tenth Circuit's analysis in *Cooper*, the unusual facts of that case are not comparable to this case. In *Cooper*, the court noted that the defendant (as well as the government) had been "misled into believing that the information had been filed timely," and concluded that in those circumstances no waiver had occurred. 956 F.2d at 960. Here, as petitioner concedes (Pet. 20), the asserted

---

[11] "The record indicates that the government presented the information to the court before the statute expired, but it was retained by the court's staff and not actually lodged or docketed until after Mrs. Cooper's arraignment." 956 F.2d at 961 n.2.

ground for his raising of the defense, the deletion from 18 U.S.C. 3293 of the reference to 18 U.S.C. 1008, occurred before his trial.[12] But petitioner, although represented by counsel whose competence he has not questioned, did not raise the defense until his second post-trial motion for a judgment of acquittal. The motion was filed approximately 110 days after the district court had disposed of his post-trial motion, and more than six and one-half months after the jury had returned its verdicts. On the facts of this case, there is no reason to believe that the Tenth Circuit would relieve petitioner from his waiver of his statute of limitations defense.[13]

Second, even if petitioner had not waived this claim, no post-trial motion seeking dismissal of the indict-

---

[12] Former 18 U.S.C. 1008 prohibited false statements made for the purpose of influencing the Federal Savings and Loan Insurance Corporation (FSLIC). In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), Congress transferred the insurance functions of FSLIC to the Federal Deposit Insurance Corporation (FDIC), see, *e.g.*, Title II, § 205, 103 Stat. 194-195, enacted an amended 18 U.S.C. 1014 that, *inter alia*, replaced Section 1008, Pub. L. No. 101-73, Title IX, § 961(h), 103 Stat. 500, repealed Section 1008 as superfluous, § 961(g)(1), 103 Stat. 500, and extended to ten years the statute of limitations for certain financial institution offenses, including violations of Section 1008, § 961(*l*)(1), 103 Stat. 501 (codified at 18 U.S.C. 3293). In 1994, Congress deleted as obsolete the reference in 18 U.S.C. 3293 to former Section 1008. Pub. L. No. 103-322, Title XXXIII, § 330002(e), 108 Stat. 2140 (Sept. 13, 1994).

[13] The other case cited by petitioner (Pet. 21) in support of his claim of conflict, *United States* v. *Percio*, 870 F.2d 1090 (6th Cir. 1989), merely stands for the proposition that when a defendant explicitly waives a limitations defense, he will be held to that waiver. See *id.* at 1092-1094.

ment would have been timely unless it was filed within the time period prescribed by Federal Rule of Criminal Procedure 29(c). See *Carlisle* v. *United States*, 517 U.S. 416, 421 (1996). Under the most generous interpretation of Rule 29(c), the time period it prescribes ended on February 7, 1995, when the district court ruled on petitioner's first post-trial motion. Petitioner's second motion was filed on May 24, 1995, more than three months later.

And even if petitioner's claim was neither waived nor time-barred, it would still be without merit. It is settled law that the timely filing of an indictment tolls the statute of limitations as to the charges made in that indictment. See *United States* v. *Schmick*, 904 F.2d 936, 940-941 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991); *United States* v. *Elliott*, 849 F.2d 554, 561 (11th Cir. 1988); *United States* v. *Grady*, 544 F.2d 598, 601-602 (2d Cir. 1976). For the same reasons, although an indictment is untimely if, at the time it is filed, the statute of limitations has already expired, see, *e.g.*, *Bridges* v. *United States*, 346 U.S. 209, 224-226 (1953), the timely filing of an indictment renders irrelevant any later shortening of the statute of limitations. Because, as petitioner concedes (Pet. 3, 20), the indictment in this case was timely filed in December 1993, *i.e.*, within the ten-year period specified for financial institution offenses in 18 U.S.C. 3293, the repeal of that ten-year period as to violations of former 18 U.S.C. 1008 in September 1994 had no effect on petitioner's prosecution for that false statement offense. Cf. *Schmick*, 904 F.2d at 941 (superseding indictment filed *after* statute of limitations runs is valid so long as charges not broadened).

3. Finally, petitioner contends (Pet. 24-26) that the court of appeals erred in holding that a literally true statement can be the basis for a false statement conviction, and that that ruling is inconsistent with *Bronston* v. *United States*, 409 U.S. 352 (1973). These contentions do not warrant review.

To establish petitioner's violation of former 18 U.S.C. 1008, the government was required to show that (1) petitioner submitted or caused to be submitted to Gulf a false financial statement; (2) the false statement was material;[14] (3) petitioner did so knowingly and for the purpose of influencing FSLIC's actions; and (4) Gulf was insured by FSLIC. Gulf's insured status was beyond dispute. See, *e.g.*, GXs 1A-1C. The evidence further showed that on February 12, 1985, see GX 2D (cover letter), petitioner submitted to Gulf a July 23, 1984, financial statement for K & K, GX 2E, that omitted more than $1.4 million in loans made by Chemical Bank to K & K in October and November 1994. See 21 R. 155-166, GXs 2F-2J (detailing loans). A rational jury could have found that the K & K statement was submitted as a purportedly accurate representation of K & K's financial condition in February 1995, that the omission of $1.4 million in liabilities on the statement was material, and that in light of petitioner's statement to co-defendant David Lichtenstein that he knew what bank examiners needed to see, 26 R. 48, petitioner had submitted the statement in order to assist the Mmahats in deceiving the examiners who were working on

---

[14] We assume the element of materiality for present purposes, see Pet. App. 29a, although the better view is that, in the absence of any textual element of materiality, such proof is not required. *United States* v. *Wells*, 117 S. Ct. 921 (1997).

FSLIC's behalf. The jury was free to reject petitioner's argument (3 Supp. R. 60-61) that the statement was not intended to show K & K's financial position in February 1985, but was rather meant only as a "snapshot in time" of its position in July 1984.

The jury was likewise free, as the court of appeals correctly pointed out (Pet. App. 29a-30a), to reject the argument that petitioner makes here, *i.e.*, that because the July 23, 1984, K & K financial statement he submitted to Gulf in February 1985 was literally true when first prepared, *i.e.*, it accurately represented K & K's financial position on July 23, 1984, he did not violate Section 1008. Contrary to petitioner's assertions, the false statement charged in Count 2 was made not in July 1984, when the financial statement was prepared, but in February 1985, when he provided it to Gulf as a purportedly accurate portrait of K & K's current financial situation. As such, the statement was not literally true. Instead, it omitted, *inter alia*, millions of dollars in liabilities that K & K had assumed in October and November 1994. See 21 R. 155-166, GXs 2F-2J (detailing loans). Accordingly, the statement did not present an accurate picture of K & K's financial situation at the time it was submitted. See *United States* v. *Stephens*, 779 F.2d 232, 237 (5th Cir. 1985) (submission of dated statement omitting post-statement loans); *United States* v. *Clark*, 546 F.2d 1130, 1134 (5th Cir. 1977) (submission of form, not content of form, may be false "statement" alleged in indictment). The court of appeals correctly found that the evidence was sufficient to support petitioner's false statement conviction.

Petitioner's reliance (Pet. 25) on *Bronston* v. *United States*, 409 U.S. 352, 357-358 (1973), a perjury prosecution, is misplaced. *Bronston* itself noted (*id.*

at 358 n.4, quoting Model Penal Code § 208.20, Comment (Tent. Draft No. 6, 1957, at 124)) that in the case of criminally fraudulent statements, the law goes "rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations." In this case, petitioner's submission in February 1985 of a July 1984 statement that no longer accurately reflected K & K's financial position was at most an "intentional creation of false impressions by a selection of literally true representations," as "select[ed] and arrange[d]" by petitioner.[15]

---

[15] The other cases relied on by petitioner (see Pet. 25), *e.g.*, perjury prosecutions like *United States* v. *Lighte*, 782 F.2d 367, 373-374 (2d Cir. 1986) (unresponsive answers to grand jury questions), or false statement prosecutions like *United States* v. *Mayberry*, 913 F.2d 719, 721-722 (9th Cir. 1990) (bank's accurate statement of amount of money in customer's account at specific time), are likewise inapposite. They had no occasion to consider the sufficiency of the evidence supporting a false statement conviction in the circumstances presented here, *i.e.*, the knowing intentional submission of a no longer accurate financial statement to create the false impression that the K & K loan was properly documented and that K & K's financial state was sounder than it was.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS M. GANNON
Attorney

MARCH 1998